

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

OSCAR ORTEGA

Claimant

VS.

EXCEL CORPORATION

Respondent

Self-Insured

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Docket No. 195,974

ORDER

Claimant appealed the Award dated February 11, 1998, entered by Administrative Law Judge Kenneth S. Johnson. The Appeals Board heard oral argument on September 2, 1998.

APPEARANCES

Thomas R. Fields of Kansas City, Kansas, appeared for the claimant. D. Shane Bangerter of Dodge City, Kansas, appeared for the respondent.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

After finding that claimant was terminated for cause after striking a supervisor and after refusing to perform the work assigned, Judge Johnson concluded claimant's permanent partial disability benefits should be limited to the functional impairment rating. Also, the Judge found that a medical bill incurred with Dr. M. Joseph Ramirez of Guymon, Oklahoma, represented unauthorized medical treatment.

Claimant requested the Appeals Board to review the following issues:

- (1) What is the nature and extent of disability?
- (2) Were Dr. Ramirez's services authorized or unauthorized?

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

- (1) The parties stipulated that Oscar Ortega sustained personal injury by accident arising out of and in the course of his employment with Excel Corporation on October 6, 1994. Also, the parties agreed that Mr. Ortega sustained a 12.5 percent functional impairment as a result of the accident.
- (2) Although he was continuing to experience symptoms in his neck, upper back, and shoulders, Mr. Ortega continued to work for Excel after the accident until he was terminated in December 1994 for an altercation with a supervisor and failing to perform his assigned duties.
- (3) Although the Appeals Board is not persuaded that Mr. Ortega struck his supervisor, the Board is persuaded that Mr. Ortega refused without cause to perform the work his supervisor and lead man specifically requested him to do on the morning of December 19, 1994.
- (4) Before his termination, Mr. Ortega obtained medical treatment from the company physician, Pedro A. Murati, M.D. After Dr. Murati released him from treatment without restrictions, Mr. Ortega sought a second opinion from Dr. Joseph Ramirez.
- (5) After leaving Excel's employment, Mr. Ortega obtained a job with a construction company driving a loader for \$7.70 per hour.

CONCLUSIONS OF LAW

The Award should be affirmed.

- (1) Because his is an "unscheduled" injury, the formula for permanent partial disability benefits is governed by K.S.A. 44-510e, which provides in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In

any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

That statute, however, must be read in light of Foulk¹ and Copeland.² In Foulk, the Court held that a worker could not avoid the presumption of no work disability contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job that the employer offered that paid a comparable wage. In Copeland, the Court held, for purposes of the wage loss prong of K.S.A. 44-510e, a worker's post-injury wage would be based upon ability rather than actual wages when the worker failed to put forth a good faith effort to find appropriate employment after recovering from the injury.

(2) Because Mr. Ortega continued to work for Excel after the accident and earned a wage equivalent to what he was earning before the accident, the permanent partial general disability benefits that are due for the period before his termination are limited to the stipulated 12.5 percent functional impairment rating.

(3) Because the policy considerations set forth in Foulk are applicable to situations where a worker returns to work at a comparable wage and is later terminated for reasons involving willful misconduct or conduct tantamount to a refusal to work, the permanent partial disability benefits that are due after the termination are also limited to the functional impairment rating.

(4) The medical expense incurred with Dr. Ramirez is unauthorized and, therefore, subject to the \$500 statutory limit.³ Before unauthorized services may be deemed authorized, the employer must have knowledge of the injury and either refuse or neglect to reasonably provide medical services.⁴ Here, Mr. Ortega failed to prove that he requested additional medical treatment from Excel before seeing Dr. Ramirez, or that other circumstances existed that would support the conclusion that the company was aware that he needed additional treatment. Therefore, it cannot be said that Excel either refused or neglected to reasonably provide treatment.

¹ Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

² Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

³ K.S.A. 44-510(c)(2).

⁴ K.S.A. 44-510(b).

AWARD

WHEREFORE, the Appeals Board affirms the Award dated February 11, 1998, entered by Administrative Law Judge Kenneth S. Johnson.

Dated this ____ day of September 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Thomas R. Fields, Kansas City, KS
Pamela Fuller, Administrative Law Judge
D. Shane Bangerter, Dodge City, KS
Philip S. Harness, Director